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December 6, 2002

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

via electronic submission

Re: ***Ex Parte* presentation in CC Docket No. 01-338, CC Docket No. 96-98, and CC Docket No. 98-147**

Dear Ms. Dortch:

Talk America, Inc. and Broadview Networks, Inc. (collectively, the "Responding CLECs"), hereby respond to a written *ex parte* presentation made to Chairman Michael K. Powell by the Regional Bell Operating Companies ("RBOCs")[1] on November 19, 2002.[2] In their *ex parte,* the RBOCs advocate an incorrect and overly narrow view of the States' authority and role in implementing the pro-competitive provisions of the Telecommunications Act of 1996 (the "1996 Act"). They urge the Commission to conclude that it *must* preempt every State public utility commission ("PUC") action that would add, as well as take away from, the list of UNEs adopted by the Commission in the *Triennial Review.* At the same time, as a matter of policy, the RBOCs claim that the Commission *should not* permit the States the latitude to make additional unbundling decisions. Further, and for similar reasons, the RBOCs maintain that the Commission should not and cannot delegate to the States any part of the Commission's responsibility under the Act to make unbundling decisions. Finally, the *RBOC ex parte* maintains that, where the Commission determines to take an unbundled network element ("UNE") off the national list for purposes of Section 251(c) of the Communications Act of 1934, as amended (the "Act"), Section 271 of the Act requires that the element only be made

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1 Qwest, BellSouth, SBC, and Verizon

2 Letter of Herschel L. Abbott, Jr., BellSouth, *et al* to Michael K. Powell, Chairman, FCC, dated November 19, 2002. ("BOC ex parte")

available at "market terms and conditions." For the reasons set forth below, the *RBOC ex parte* presents an erroneous and self-serving view which blithely ignores the structure of the Act and the clear role Congress established for the States within that framework.

1. Preemption

For the reasons explained below, the Responding CLECs submit that the States have the authority under the Act to establish additional unbundling obligations, as long as certain conditions set out in the Act are met. Furthermore, it would be premature for the Commission in the *Triennial Review* to preempt any specific State unbundling requirements let alone *all* future State unbundling requirements sight unseen. Preemption should occur, if at all, only in an adjudicatory setting upon an appropriate record.

The FCC has on two previous occasions concluded that, under Section 251(d)(2), the Commission adopts a minimum list of unbundled network elements ("UNEs") to which States have the authority to add. In the *Local Competition Order,* the FCC concluded that it would identify a minimum number of network elements that the incumbent LECs must unbundle but that individual States, under Section 252(e)(3) may go beyond that minimum list and impose additional requirements.[3] In fact, the Commission rejected the proposal that it develop "an exhaustive list of required unbundled elements, to which States could not add additional elements, on the grounds that such a list would not necessarily accommodate changes in technology, and *it would not provide States with the flexibility they need to deal with local conditions*."[4] The Commission's *UNE Remand Order*, as the *RBOC ex parte* acknowledges, similarly concluded, this time relying on the more specific Section 251(d)(3), that State PUCs may establish access obligations upon ILECs beyond those imposed by the national list, with the sole limitation that the additional obligations comply with the standards in subsections

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[3] *See Implementation of the Local Competition Provision of the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, 15527, ¶54 (1996) ("*Local Competition Order*") (subsequent history omitted). The adoption of minimum standards was consistent with Congressional intent. The Senate recognized that the FCC "will establish the national minimum standards for opening local telephone networks and other competitive requirements." Senate Commerce Committee Report, S.Rep. No. 104-23, 1st Sess. (1995).

Section 253(e)(3) provides that: "Notwithstanding paragraph [252 (e)(2)], but subject to Section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements." 47 U.S.C. § 252(e)(3).

[4] *Local Competitive Order,* at ¶ 243 (emphasis added).

251(d)(3)(B) and (C).[5] There is no basis to depart from those sound statutory interpretations in this *Triennial Review*.

The RBOCs contend that any State regulation regarding unbundling that differs in any way from what the Commission requires must be preempted. This goes too far. While the D.C. Circuit Court of Appeals in *USTA v. FCC*, 290 F. 3d 415 (2002) may have imposed some limits on the Commission's unbundling actions under Section 251(d)(2) – limits that the RBOCs contend apply equally and fully to the States – the Court did not speak to the States role under the Act at all. Significantly, apart from a few token references, the *RBOC ex parte* does not address or grapple with to the important role the 1996 Act gives to the States. Rather than address that role, the RBOCs would have the Commission run rough shod over the statutory provisions that establish that role unequivocally.

Congress intended for active participation by the States to achieve the goals of Sections 251 and the Act in general, namely the opening up of the ILECs' networks, thereby furthering local and exchange access competition.[6] For this reason, Congress preserved State authority to impose additional regulations under several sections of the Act, including Sections 261(c),[7] 252(e)(3) and 251(d)(3). Sections 261(c) expressly permits States to adopt "Additional State Requirements" that are "necessary to further competition." Section 252(e)(3) expressly recognizes that that States may establish and enforce requirements of State law when reviewing interconnection agreements under Section 252(e), subject only to review under Section 253 of the Act. In and of themselves, these provisions provide sufficient authority for States to establish additional unbundling elements. However, Section 251(d)(3) reveals explicit Congressional intent to preserve State authority to adopt unbundling requirements even in circumstances where the Commission does not. In fact, the Eighth Circuit Court of Appeals held that subsection 251(d)(3) specifically deals with access and interconnection obligations and that it "constrains the FCC's authority" to preempt State unbundling obligations.[8] If the FCC were to accept the

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[5] 47 U.S.C. § 251(d)(3). *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd. 3696, 3767,¶ 154 (1999) (*"UNE Remand Order"*) (subsequent history omitted).

[6] *Local Competition Order*, 11 FCC Rcd. at 15505, ¶ 2.

[7] Section 261(c) states: "Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part." 47 U.S.C. § 261(c).

[8] *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 806 (8th Cir. 1997); not at issue in *AT&T v. Iowa Utils. Bd.,* 525 U.S. 366 (1999). The Eighth Circuit strongly suggested that a general FCC rule

RBOCs arguments that the FCC's national list of UNEs adopted under Section 251(d)(2) represents a maximum list upon which the States may not build, this would effectively wipe out the State authority to "establish access obligations" preserved by Congress under Section 251(d)(3), as well as the authority explicitly preserved in Sections 252(e)(3) and 261(c).

It is in the context of this statutory background that the RBOCs' claims for preemption must be scrutinized. The foundation of preemption doctrine is "the Supremacy Clause, U.S. Const., Art. VI, cl. 2, [which] invalidates state laws that 'interfere with, or are contrary to' federal law."[9] Preemption may be express or implied. Express preemption occurs to the extent that a federal statute explicitly directs state law be ousted completely, or to some lesser degree, from a field. Implied preemption occurs either when the *scope* of a statute indicates that Congress intended federal law to occupy the field exclusively (field preemption), or when state law is in actual conflict with federal law (implied conflict preemption).[10] Given the authority preserved for the states in several places, the preemption is not express, and the RBOCs do not in the *RBOC ex parte*, nor elsewhere to the Responding CLECs' knowledge, contend that the preemption is express. Turning to the two types of implied preemption, "field" preemption occurs where Congress has legislated so comprehensively in the area in question, thus occupying the entire field of regulation, so as to leave no room for the states to supplement federal law.[11] The Supreme Court has found conflict preemption *either* where it is impossible for a private party to comply with both State and federal requirements, *or* where State law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress.[12] Significantly, the standards applicable to an "implied conflict" preemption analysis under Supreme Court decisions closely parallel the criteria adopted by Congress under Sections 251(d)(3)(B) and (C):[13]

> *In prescribing and enforcing regulations to implement requirements of this section*, the Commission *shall not* preclude the enforcement of any regulation, order, or policy of a State commission that-

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would be inappropriate to preempt any specific state regulations adopted under Section 251(d)(3). *See Iowa Utils. Bd.*, 120 F.3d at 806-07 & fn. 27-28.

9 *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 US 707, 712 (1985) (citation omitted).

10 *Freightliner Corp. v. Myrick*, 514 US 280, 287 (1995). *See also Jones v. Rath Packing Co.*, 430 U.S. 519, 540 (1977) (where compliance with state law does not trigger "federal enforcement," the state law is not inconsistent with federal law).

11 *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

12 *See Rath Packing Co.*, 430 U.S. at 540; *Freightliner Corp.*, 514 U.S. at 287.

13 *Compare* Sections 251(d)(3)(B) and (C).

> (A) establishes *access* and interconnection obligations of local exchange carriers;
>
> (B) is consistent with the requirements of this section; and
>
> (C) does not *substantially* prevent implementation of the requirements of this section and the purposes of this part.

47 U.S.C. § 251(d)(3) (emphases added)

Recognizing the weakness of directly arguing for field preemption, the RBOCs on paper maintain that there is only implied conflict preemption.[14] But, in reality, the RBOCs argue that the States may neither do nothing more nor nothing less than what the Commission requires. This amounts to an argument that Congress intended for the Commission alone to make unbundling determinations, *i.e.*, field preemption (no matter what one may choose to call it). If every State requirement that was not precisely aligned with the Commission's regulations was unlawful, that would mean the Congress intended to harbor no additional State requirements under any circumstances. However, as shown above, Congress in a number of ways, including specifically in the area of unbundling regulation, left room for supplemental state law. Indeed, as if to underscore this fact, Congress provided that the 1996 Act and the amendments made by the 1996 Act "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments."[15] Under this provision, the RBOCs cannot rationally argue that the Commission must preempt all State requirements that would add to its Section 251(d)(2) determinations where Congress has made express the continuing authority of the States to adopt such requirements.

In fact, reading Section 251(d) as a whole, the States, under Section 251(d)(3), are not bound by the specific limits placed on the Commission when adopting unbundling obligations in Section 251(d)(2).[16] It would require a truly distorted reading of Section 251(d)(3) to conclude that all State access and interconnection regulations must be coextensive with the FCC's regulations promulgated under Section 251 to be consistent with that Section.[17] In taking this

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[14] *RBOC ex parte* at 5. Moreover, Verizon, for example, has earlier agreed that an implied conflict analysis is appropriate. *See* Verizon Reply Comments, CC Dockets No. 01-338 *et al.*, at 53 & n. 151 (filed July 17, 2002).

[15] 1996 Act, Section 601(c)(1), 110 Stat. 56, 143 (1996).

[16] Where Congress intended to put limits on the States commensurate with the FCC's implementation, it did so, *e.g.* the Section 252(d) pricing standards.

[17] Thus, in the *UNE Remand Order*, the FCC erred in tying State authority to the standards set forth in Section 51.317 of its regulations. States are not bound by the limitations imposed on the FCC, they are bound by the limitations set forth in the Act. *See also Iowa Utils. Bd.*, 120

position, the Responding CLECs are not suggesting that States may impose *any* unbundling requirements, and hotly dispute the RBOCs' characterization in their *ex parte* of any position that differs with theirs on these issues is tantamount with a "more unbundling is better" approach. Under Subsection 251(d)(3)(B), any State unbundling obligations must be consistent with the requirements of Section 251. Subsection 251(d)(3)(C) prohibits the States from adopting regulations that would "*substantially* prevent" the opening of the ILEC's networks to competitive carriers that the FCC orders in implementing the competitive provisions of Section 251(c).[18] In fact, Congress's language and the structure of Section 251(d)(2) make clear that the Commission establishes a *floor* through Section 251(d)(2), and the States may (but need not) establish a higher ceiling through Section 251(d)(3).

There is no question that ILECs, as a general matter, have been and will continue to be able to comply with *both* minimum federal unbundling obligations adopted by the Commission *and* any additional State unbundling obligations. Under current Commission regulations, the States may add to the list, but not subtract from the unbundling requirements.[19] As long as State access requirements are not in conflict with the ILEC's obligations under the federal rules, so that compliance with both sets of requirements is impossible, the State obligations should be deemed to meet the Section 251(d)(3)(B) requirement of consistency.

Furthermore, state unbundling requirements that may go beyond the FCC's requirements will require ILECs, in essence, to open their markets further than the Commission in its rules mandates. Such State requirements would not inherently *substantially* impede the purposes of the 1996 Act or even the balancing of interests that the Court in *USTA v. FCC* imposes on the Commission's determinations in Section 251(d)(2). (The fact that State actions regarding unbundling must not only impede, but *substantially* impede, the achievement of the Act's purposes further underscores the impropriety of a blanket preemption of all state unbundling requirements on the theory that the Commission sets both a *floor* and a *ceiling*..) After all, the Act places an affirmative obligation on ILECs to open their markets to competition, and their networks to competitors, subject to limitations set forth in the Act that respectively address Commission and State PUC action. Additional unbundling obligations as determined by States in the context of specific local market conditions will not necessarily impede those federal

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F.3d at 806 ("[S]ubsection 251(d)(3) would prevent the FCC from preempting [a] state rule [that met the standards of Sections 251(d)(3)(B) and (C)] even though it differed from an FCC regulation.")

[18] In addition, state regulations would also be constrained by Section 253(a), among other statutory and constitutional requirements.

[19] This is not to say that the Commission could not permit State commissions, pursuant to proper federal guidelines, to remove items from the Commission-adopted list. In fact, this is in essence what Talk America, Broadview networks, and other CLECs propose in their October 23, 2002, *ex parte* presenting a UNE-P to UNE-L Migration Plan.

requirements, let alone substantially do so. The States, being much closer to local market conditions and what is necessary to foster competition in those markets through obligations above and beyond the minimum that the FCC requires, can reasonably determine that the promotion of competition in local markets consistent with the fostering of facilities-based competition among the several types of competition the 1996 Act made available requires more than what the FCC mandates under Section 251(d)(2).

Today, in light of the varied and myriad changes that have occurred in local telecommunications markets since the 1996 Act was implemented and local competition has been introduced, including the entry and exit of many competitive carriers and the current state of capital markets, the variation in local conditions is even greater than it was seven years ago. A top-down one-size-fits-all approach is even less appropriate than it was in 1996 or 1999. The ILECs argue that the States might go too far and undermine the integrity and viability of an incumbent's network Any such claims need to be examined in specific circumstances in which they are adopted and the markets in which they are implemented. The FCC should not adopt a *per* se rule tantamount to a finding of "field" preemption that all State unbundling obligations substantially impede achievement of the purposes of the 1996 Act. Were that to happen, it would be the inability of the States to adopt additional access obligations that ultimately would frustrate the pro-competitive purposes of the 1996 Act, rather than *vice versa*.

In sum, for the FCC to eliminate authority of States to add additional unbundling requirements for UNE-P or any other network element or combination on the grounds that the Commission alone has the authority to adopt unbundling requirements would itself conflict with the Act. The FCC may not through regulation overrule Section 251(d)(3) (or Sections 252(e)(3) or 261). Indeed, because of the intractable nature of this problem, the *RBOC ex parte* offers no suggestion what, under its reading of the Act, Section 251(d)(3) allows the States to do, other than closely parrot the federal requirements. The RBOCs give the Commission no guidance how, through regulation, the Commission can preempt all State unbundling decisions. If it were the case that Congress intended for the Commission alone to make unbundling decisions, the Congress would not have needed to included Section 251(d)(3) in the 1996 Act at all. Yet, Congress did so. In light of the obvious role preserved for the States, while the precise limits of that role may not have been unmistakably delineated in the Act in all circumstances, the Responding CLECs urge the Commission to decline in this rulemaking to preempt sight-unseen all State attempts to implement additional unbundling requirements. Rather, in light of the State authority preserved in Section 251(d)(3) and the limitations placed thereon, the FCC or the courts should consider the preemption of State unbundling regulations, *if at all*, only on a case-

by-case basis in adjudicatory settings subject to the limitations in Sections 251(d)(3)(B) and (C).[20]

2. Delegation

The *RBOC ex parte* also challenges the ability of the Commission to integrate the States into any part of the regulatory framework adopted by the Commission to ascertain the minimum list of UNEs established pursuant to Section 251(d)(2). *See RBOC ex parte* at 7-9. The RBOC s maintain that "[i]t would be neither sensible nor lawful for this Commission to punt these difficult unbundling decisions to the states, whether expressly or (what is the same) by failing to identify objective, specifically defined circumstances in which unbundling particular UNEs is and is not appropriate." *Id.* at 7.[21] To the contrary, as explained herein, where the State PUCs have local expertise that the Commission does not have, it is sensible for the State PUCs to have involvement in the unbundling decisions. Further, Talk America and Broadview fully expect that any determinations under Section 251(d)(2) that the State agencies make under authority delegated by the Commission will be pursuant to Commission-established criteria that would be applied to local circumstances to dictate when the continued availability of UNE-P (and perhaps other UNEs) is and is not appropriate.

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[20] In light of the express preservation of State authority to adopt their own requirements in addition to those adopted by the Commission, it is inherent that there may be some additional litigation stemming from State efforts to implement those requirements. Indeed, the entire structure of the Section 252 arbitration framework makes some level of state-by-state adjudications not only inevitable, but inherent in the process. Thus, the RBOCs' arguments that litigation stemming from individual state determinations is an evil that simply must be avoided cannot be readily accepted. *See RBOC ex parte* at 6-7. Although the Commission was concerned about the uncertainty that might arise if State PUC could remove UNEs from the national list, this concern principally stemmed from the concerns that *competitive* carriers would have difficulty carrying out their business strategies and raising necessary capital, and less so the effect of uncertainty for the incumbents. *See UNE Remand Order* ¶¶ 158-59, 161. It is amusing how the RBOCs now suggest that the concerns regarding uncertainty and litigation were for the benefit of incumbents after years of forcing would-be competitors to fights tooth and nail, state by state, for the network elements and other terms they needed to compete.

[21] The RBOCs adamancy that it would be dangerous to let states make the unbundling decisions is surprising in that many of the RBOCs and other ILECs generally contained provisions in their interconnection agreements for years whereby States would make decisions in the event of *bona fide* requests for new UNEs and, even more so, because the ILECs took the issue all the way to the Supreme Court (*AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999)). whether the Commission or individual State PUCs should make the determinations as to the standard under which UNEs, interconnection, resale discounts, and reciprocal compensation should be priced, arguing that each individual state should make that decision.

The issue of the Commission's ability to delegate such authority to the States must be placed in the broader context of the Act. Congress gave the Commission broad discretion to implement the Act following procedures the Commission deemed appropriate. Section 4(i) of the Act empowers the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). Similarly, the Act provides in Section 201(b) that the Commission "may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of the Act." 47 U.S.C. § 201(b). These two provisions give the Commission considerable latitude, as a general matter, in how the Act gets implemented, and provide an underlying basis for the delegation of Commission authority. Similar language in other federal agencies' enabling statutes has been reviewed by the federal courts and found to support delegation of authority. *See, e.g., Rodriguez v. Compass Shipping Co.*, 617 F.2d 955, 958 (2d. Cir. 1980); *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 121 (1947).

Significantly, as introduced above, the 1996 amendments to the Act creates a considerable role for the State PUCs in carrying out the Act's requirements. States, for example, establish the prices CLECs will pay for UNEs subject to federal court review and pursuant to Commission determinations about methodology. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. at 376-386 (1999); 47 U.S.C. § 252(d)(1) In doing so, the States are given considerable latitude regarding cost inputs, cost factors, and other details that depend upon their expert knowledge regarding local market conditions. Further, the States oversee and resolve disputes between CLECs and ILECs when the parties are unable to negotiate all of the terms of their interconnection agreements, as provided for in Section 252 of the Act. 47 U.S.C. § 252(b). Since the passage of the Act, it is the States PUCs that have determined whether, consistent with the FCC's rules, a particular ILEC has to make specific UNEs available to CLECs in specific circumstances and at what prices, terms, and conditions. Oftentimes, this has involved determinations regarding network elements not clearly on the FCC's list. State PUCs approve both negotiated and arbitrated interconnection agreements, and in reviewing the latter are charged with making sure that the agreements meet the requirements set by the Commission in its regulations and the requirements of the Section 251. 47 U.S.C. § 252(e). Further, the State PUCs commonly enforce interconnection agreements when disputes arise during their administration and the majority of circuit courts addressing the matter have ruled that they have the authority to do so. *MCI Telecomms. Corp. v. Bell Atl-Pa.*, 271 F.3d 491, 500-01 (3rd Cir. 2001); *Southwestern Bell Tel. Co. v. Public Utility Commission of Texas,* 208 F.3d 475, 479-80 (5th Cir. 2000); *Southwestern Bell Telephone Co. v. Brooks Fiber Communications of Okla., Inc.*, 235 F.3d 493, 496-97 (10th Cir. 2000); *Ill. Bell Tel. Co. v. WorldCom Techs., Inc.,* 179 F.3d 566, 568-69 (7th Cir. 1999), *cert. granted*, 532 U.S. 903 (2001).

In carving out this important role for the State PUCs, the Congress preserved the authority of the States to establish and enforce requirements under State law, including unbundling obligations, as discussed in detail above. *See* 47 U.S.C. §§ 251(d)(3), 252(e)(3),

261(b), and 261(c). It is beyond question that States have always played and continue to play in the development of local competition under the Act. That role is inextricably interwoven into the provisions adopted by the Telecommunications Act of 1996 (the "1996 Act"), including Section 251. The question of whether the FCC has the authority to delegate some portion of the Commission's responsibilities regarding unbundled network elements under the Act must be scrutinized in this context and cannot be considered apart from it.[22] From that perspective, as detailed below, it is clear that Commission delegation to the State PUCs of the task of determining in specific markets where UNE-P must be made available would be permissible.

The *RBOC ex parte* categorically asserts that the Commission may not delegate to the States any portion of its responsibilities to determine what UNEs should be made available under Section 251(d)(2). *RBOC ex parte* at 7-8. The RBOCs base that position almost exclusively on the fact that Section 251(d)(2) refers to "the Commission" determining which UNEs are to be made available. However, in Section 251(d)(2), the Congress did not expressly grant the Commission exclusive jurisdiction or expressly preclude delegation of the Commission's implementation of that section.[23] Significantly, the FCC arguably has already delegated some of its functions in Section 51.317(b)(4) of its Rules where it holds the States to the same requirements as the Commission itself when making unbundling decisions. 47 C.F.R. § 51.317(b)(4). The RBOCs did not challenge the adoption of the Commission's Rule 51.317(b)(4). Accordingly, the analysis of the Commission's ability to delegate its unbundling responsibilities under Section 251(d)(2) is more complicated than the *RBOC ex parte* would have the Commission conclude.

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[22] In engaging in this discussion, Talk America wants to make clear the distinction between the issue of whether a State PUC can be delegated some portion of the Commission's responsibilities under the Act, on the one hand, and the issue of whether a State PUC *independently* may adopt and implement a particular regulation under Sections 251(d)(3), 252(e)(3), 261(b), or 261(c) , on the other hand. The first part of this *ex parte* does not address the latter question.

[23] The RBOCs are contending that the FCC was given exclusive jurisdiction over unbundling. The language of the statute, and Section 251(d) in particular, does not support that conclusion. Where the Congress wanted to grant exclusive jurisdiction in the 1996 Act, it did so expressly. *See, e.g.,* 47 U.S.C. § 251(e)(1) (jurisdiction over numbering resources and utilization). In that case, Congress had to state explicitly that the FCC could delegate some of that authority to the States. *Id.* The Congress did *not* give the Commission exclusive jurisdiction over unbundling in Section 251(d)(2). Indeed, in Section 251(d)(3), the Congress expressly preserved the ability of State PUCs to adopt unbundling obligations of their own. The Congress's failure to give the Commission exclusive authority on unbundling is not surprising given the pivotal role that states were to play in implementing the 1996 Act's provisions and supports the authority of the Commission to delegate some of its functions to the States.

The case law, some of which is cited by the RBOCs, makes clear that a federal agency can delegate its authority to another person or entity provided certain conditions are met. Delegation (or, more technically, "subdelegation" of the authority given the Commission by Congress) need not rest on express statutory authority. *See S. Pac. Transp. Co. v. Watt*, 700 F.2d 550, 556 (9th Cir. 1983) (citing *Fleming*, 331 U.S. at 120-22). More specifically, the courts have held that delegation of administrative responsibilities to other sovereign entities such as a State or local government are not necessarily improper. *See S. Pac. Transp. Co.*, 700 F.2d at 556; *see also United States v. Mazurie*, 419 U.S. 544, 556-557 (1975). Significantly, not only are States, acting through State PUCs, sovereign entities, the Act clearly establishes they have an important role in the implementation of the 1996 Act, and unbundling obligations in particular, as demonstrated above. Therefore, it is beyond reasonable argument for the RBOCs to contend (as they do) that the Commission could *not* in any circumstances delegate any of its Section 251(d)(2) responsibilities to the State PUCs.

Where there is no express congressional authorization for delegation, a review of the purposes of the statute in question is instrumental to set the parameters of the federal agency's authority to delegate. *See Assiniboine & Sioux Tribes v. Bd. of Oil and Gas Conservation of the State of Mont.*, 792 F.2d 782, 791-792 (9th Cir. 1986). *See also Nat'l Ass'n of Psychiatric Treatment Ctrs. For Children v. Mendez*, 857 F. Supp. 85, 91 (D.D.C. 1994) ("[D]elegation generally is permitted where it is not inconsistent with the statute") (citing *Tabor v. Joint Bd. For the Enrollment of Actuaries*, 566 F.2d 705, 708 n. 5 (D.C. Cir. 1977)). In this case, the purposes of the statute is to facilitate the introduction of competition in local telecommunications markets after years of monopoly service by the RBOCs and other incumbent local exchange carriers. Given (1) the expertise of State PUCs regarding local markets, (2) the express preservation of authority of State PUCs to adopt unbundling regulations and adopt requirements applicable to local exchange carriers promoting competition in telephone exchange service and exchange access in general, *see* 47 U.S.C. §§ 251(d)(3) & 261(c), discussed above,[24] and (3) the States' critical role in implementing many portions of the 1996 Act, the ability of the FCC to delegate to the States functions closely related to those already performed by the States cannot be in serious question. The real question, therefore, is not whether the FCC can delegate the determination of whether UNE-P must be offered in specific states, LATAs, or markets, but how the FCC's delegation should be structured.

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[24] Again, this argument regarding the Commission's authority to delegate is made independently of the position of Talk America, Broadview Networks and other carriers that State PUCs preserve the ability to adopt unbundling regulations of their own *without a delegation from the FCC* under Section 251(d)(3), Section 252(e)(3), and Section 261. Nonetheless, the existence of this independent authority underscores the propriety of delegation by the Commission and the wisdom of continuing state-federal cooperation.

The RBOCs concede, in the alternative, that the Commission might be able to delegate authority to the States, but if it were to do so, the Commission must retain ultimate authority over the States' decisions. The RBOCs claim, consequently, that a delegation of unbundling responsibility would require the Commission to establish "an additional regulatory framework – both at the state level and at the Commission itself –" to exercise supervision over state decisions. *RBOC ex parte* at 8. Talk America and Broadview Networks submit that the RBOCs have overstated the case, but that adequate review of any state decisions will be available to ensure the State PUCs carry out any delegated duties consistently with the Act.

Talk America and Broadview Network acknowledges that there has to be adequate review of State actions under the Act. This review can take a number of forms, and need not require the Commission to establish new State and federal frameworks. Talk America and Broadview Networks submit that existing frameworks are adequate to the task. First, States have ample experience under the Act in arbitrating, approving, and enforcing interconnection agreements. As noted above, one of the requirements under Section 252 is that the State PUCs heed the requirements of Section 251 and the Commission's regulations implementing Section 251, whether in conducting an arbitration or approving an arbitrated agreement. 47 U.S.C. §§ 252(c)(1) & 252(e)(2). So the states are, in many ways, acting under the constraints of the Commission's Rules when carrying out their general responsibilities under the Act. *But see, e.g.*, 47 U.S.C. § 252(e)(3) which allows State PUCs to establish and enforce additional obligations when carrying out their arbitration responsibilities. Determinations by State PUCs in these contexts regarding, for example, the availability of UNE-P and other network elements, are reviewable by the federal district courts under Section 252(e)(6), and the courts will ensure the State PUCs follow the Commission regulations to the extent the law requires. Further, if a State PUC fails in its responsibility to determine the availability of UNE-P in an arbitration context, the Commission itself may preempt the State PUC's jurisdiction and proceed itself to resolve open issues. 47 U.S.C. § 252(e)(5). Thus, if the FCC's regulations establish that the State PUCs make their determinations in the context of arbitration proceedings, there are already adequate vehicles for federal review of State PUC determinations to ensure the decisions are consistent with the Act and the FCC's regulations setting the parameters under which the availability of UNE-P or other network elements should be determined.

Second, where the State PUCs make a determination under the FCC's regulations regarding UNE-P to UNE-L migration *outside of the arbitration context*, there will be sufficient opportunity for Commission oversight. Section 251(d)(3) expressly provides that the FCC, in prescribing and *enforcing* regulations implementing Section 251 (including Section 251(d)(2)), the Commission may preempt State PUC actions where they are inconsistent with Section 251 and substantially impede the implementation of the requirements of Section 251 and the purposes of the 1996 Act's pro-competition provisions generally. Thus, the Commission has, at its disposal, the ability to prevent enforcement of any State action regarding the availability of UNE-P that goes beyond the bounds that it sets and the limitations Congress placed on State

actions in Section 251(d)(3).[25] In addition, federal courts will have jurisdiction to resolve federal questions raised by any State PUC action under Commission regulations. As stated earlier, the Commission has already adopted by regulation, Section 51.317(b)(4) of the FCC Rules, that provides for State PUCs making the determination regarding the availability of UNEs under the FCC's interpretation of the Section 251(d)(2) criteria. Implementation of the October 23 UNE-P to UNE-L Migration Plan of Talk America, Broadview Networks, and others by State PUCs needs to be treated no differently.

In short, regardless of whether the States PUCs proceed to establish the availability of UNE-P within their respective jurisdiction pursuant to federal guidelines established by the Commission through arbitration or something more akin to notice and comment rulemaking, there is adequate opportunity for Commission or federal judicial review.[26] Such review will ensure that State determinations reflect market realities and do not subvert any national policies established by Congress in the Act. Further, nothing in the Act precludes the FCC from establishing a framework in which it can review the State PUC determinations outside the arbitration context upon petition of an aggrieved party. *See* 47 U.S.C. § 4(i).

Consequently, the Commission could delegate some part of its responsibilities under Section 251(d)(2) without concern that it would be unlawful. Specifically, State PUCs are sovereign entities with certain powers explicitly preserved to them by Congress – including the authority to make unbundling decisions. The State PUCs are well-suited to make market-specific determinations about whether the absence of certain currently available UNEs, such as unbundled switching and UNE-P, would result in impairment of the ILECs' competitors. The Commission is very well capable of drafting sufficiently refined regulations whereby the State PUCs, with their extensive local knowledge, can take into account the local circumstances to determined whether and under what conditions UNE-P migration should occur. If the Commission's regulations meet those criteria, then there is sufficient federal oversight of the

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[25] Given the Congress's express preservation of State authority to adopt additional unbundling regulations in Section 251(d)(3), the situation involving the state- or market-specific establishment of UNE-P availability pursuant to federal regulations is akin, in a limited fashion since the FCC will be making determinations about other UNEs that ILECs must still make available, to the Commission's adoption of a pricing methodology under which State PUCs establish the rates. The *RBOC ex parte* is incorrect that there is no correlation between the two situations.

[26] The basic vehicle of the UNE-P CLECs Migration Plan is State PUC action defining the circumstances in which UNE-P migration is to occur within upon an ILEC's demonstration both that there is an equal access system to local unbundled loops and that the retail rates for local exchange service exceed the costs of wholesale inputs in the aggregate, justifying a transition from unbundled switching.

State process to ensure that the limits of the delegation are not exceeded, such that delegation would be proper.

3. Section 271 Issues

The *RBOC ex parte* argues as a separate point that where the Commission determines that a particular UNE need not be unbundled under Section 251(d)(2), that UNE cannot continue to be required under the competitive checklist of Section 271 at anything other than "market-based" prices. *RBOC ex parte* at 9-10. As a very general matter, the Responding CLECs acknowledge that the Commission, in its *UNE Remand Order*, did provide that a market-based price would apply to unbundled elements required under separate checklist items, such as unbundled switching. However, the *RBOC ex parte* overlooks several important matters.

First, as discussed above, under the Act, the States do have certain authority to require unbundling even where the Commission determines that unbundling is not required under Section 251(d)(2). Accordingly, were a State PUC, consistent with Sections 251(d)(3) and 261(c) to require, for example, that an RBOC provide an unbundled element that had been delisted under Section 251(d)(2), the RBOC may not be able to simply price that element at some "market price" without further review.

Second, the responding CLECs take issue with the notion that by "market price," the Commission intended no limits or regulation to apply at all as the *RBOC ex parte* suggests. As an initial matter, the FCC stated in the *UNE Remand Order* that the Section 201 and 202 requirements that rates be just, reasonable, and non-discriminatory would at a minimum apply. But the Commission also made clear in the *UNE Remand Order* its assumption that the Section 271 market-based pricing would occur within a competitive wholesale market. Thus, if the pricing reflects a level that would not occur in a competitive wholesale market, *e.g.*, where the RBOC price for a wholesale product exceeds the retail rate it is charging for a service the wholesale input is designed to support competitive offerings against, then the pricing can hardly be said to be "market-based" in any meaningful sense.[27] In fact, under the Commission's Section 271 decisions, the Commission has found that Section 271 checklist items generally – including the unbundled elements in checklist items 4-6 (loops, switching, and transport) – must be available at parity where there is a retail analogue and in a manner that supports a "meaningful opportunity to compete" for an efficient competitor where there is no analogue. *See, e.g., Application by SBC Communications, Inc., et al., Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas,* 15 FCC Rcd. 18354, 18373-74, ¶ 44 (2000). To determine whether the appropriate standard has been

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[27] Any such above-retail rate pricing of wholesale products by an RBOC would raise the question of whether the element at issues should have been removed from the list of UNEs in the first place, at least for the RBOC in question.

met, it would be necessary to examine, among other things, whether the pricing for the network element satisfied these requirements. Thus, despite the applicability of "market-based" pricing to UNEs offered by RBOCs with or seeking Section 271 authority that are no longer on the Commission's Section 251(d)(2) list, regulators would retain the ability to examine the rates under Section 271.

Finally, where an RBOC received authorization under Section 271 to provide in-region interLATA service by virtue of qualifying for Track A treatment due to the presence of competition from UNE-P carriers, the RBOC should be required to continue to provide UNE-P at Section 252(d)(1) cost-based rates until it can show that sufficient competition from carriers with their own switching platform exists that would have qualified the RBOC from Track A treatment.[28] This requirement flows from another under Section 271, namely the "back-sliding" requirements of Section 271(d)(6), which requires that all of the "conditions required for . . . approval" continue to be satisfied after Section 271 authorization is granted. Where the existence of facilities-based competition in either residential or business markets — meaning the very threshold predicate for seeking Section 271 Track A relief — was found, even if in part, on the basis of UNE-P competition, RBOCs with Section 271 authority would be obligated to continue to support UNE-P (at cost-based prices) under Section 271(d)(6) even where unbundled switching might have, as a general matter, been delisted under Section 251(d)(2) by the Commission.

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Pursuant to Section 1.1206(b)(1) of the Commission's rules, an original and one copy of this written *ex parte* presentation are being submitted to the office of the Secretary. Please associate this notification with the record in the proceedings indicated above.

Respectfully submitted,

Brad E. Mutschelknaus
Counsel for Talk America, Inc.
and Broadview Networks, Inc.

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[28] *See* Attachment hereto citing examples of the existence of UNE-P competition as the predicate for several Section 271 applications under Track A.

cc: Chris Libertelli (w/attachments)
Daniel Gonzalez (w/attachments)
Matthew Brill (w/attachments)
Jordan Goldstein (w/attachments)
William Maher (w/attachments)
Steve Morris (w/attachments)
Tom Navin (w/attachments)
Rob Tanner (w/attachments)
Richard Lerner (w/attachments)
Michelle Carey (w/attachments)
Scott Bergmann (w/attachments)
Qualex International (w/attachments)
Linda Kinney (w/attachments)
Nick Bourne (w/attachments)
Mary McManus (w/attachments)
Paula Silberthau (w/attachments)
Debra Weiner (w/attachments)

ATTACHMENT

See In the Matter of Verizon New Jersey, Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc., and Verizon Select Services, Inc., for Authorization to Provide In-Region InterLATA Services in New Jersey, WC Docket 02-67, *Memorandum Opinion and Order*, 17 FCC Rcd. 12274, 12281-82, ¶11 (2002) ("Verizon relies on interconnection agreements with MetTel, eLEC, and Broadview in support of its Track A showing, and we find that each of these carriers serves more than a *de minimis* number of end users predominantly over its own facilities and represents an 'actual commercial alternative' to Verizon in New Jersey. Specifically, MetTel provides telephone exchange service to both residential and business subscribers in New Jersey *primarily through UNE-platforms*. Broadview and eLEC provide service to both residential and business customers in New Jersey through UNE loops, *UNE-Platform,* and resale.") (emphases added and footnotes omitted)

See In the Matter of Application by Verizon Virginia, Inc., Verizon Long Distance Virginia, Inc., Verizon Enterprise Solutions Virginia Inc., Verizon Global Networks Inc. and Verizon Select Services of Virginia Inc., for Authorization to Provide In Region InterLATA Services in Virginia, WC Docket No. 02-214, *Memorandum Opinion and Order*, FCC 02-297,¶ 8 (Oct. 30, 2002) ("We conclude, as the Virginia Hearing Examiner did, that Verizon satisfies the requirements of Track A in Virginia. Verizon relies on interconnection agreements with AT&T, Cox, Comcast, and Cavalier in support of its Track A showing, and we find that each of these carriers services more than a *de minimis* number of residential and business end users predominantly over its own facilities and represents an 'actual commercial alternative' to Verizon in Virginia. Specifically, AT&T provides telephone exchange service to both residential and business subscribers in Virginia primarily though UNE loops, *UNE-platforms* and their own cable facilities.") (emphasis added and footnotes omitted).

See In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana, CC Docket 02-35, *Memorandum Opinion and Order*, 17 FCC Rcd. 9018, 9024-27, ¶¶ 12, 15 (2002) ("We conclude that BellSouth satisfies the requirements of Track A in Georgia. We base this decision on the interconnection agreements BellSouth has implemented with competing carriers in Georgia and the number of firms that provide local telephone exchange service, either exclusively or predominantly over their own facilities, to residential and business customers. In support of its Track A showing, BellSouth relies on interconnection agreements with AT&T (MediaOne Telecom, Teleport), MCImetro, and Mpower. We find that each of these carriers serves more than a *de minimis* number of residential and business customers predominantly over its own facilities and represents an "actual commercial alternative" to BellSouth in Georgia. Specifically, the record demonstrates that AT&T provides residential and business service to its customers over its own facilities, *UNE-Platform (UNE-P)* and UNE Loops. MCImetro provides service to residential and business customers over their own facilities and *UNE-P*.

We conclude that BellSouth demonstrates that it satisfies the requirements of Track A based on the interconnection agreements it has implemented with competing carriers in Louisiana and the numerous carriers providing facilities-based service to residential and business customers in this market. In support of its Track A showing, BellSouth relies on interconnection agreements with AccessOne, Cox, and ITC^DeltaCom. The record demonstrates that each of these carriers serves more than a *de minimis* number of residential and business customers via *UNE-P* or full-facilities lines. Thus, we find that there is an "actual commercial alternative" to BellSouth in Louisiana and that BellSouth satisfies the requirements of Track A in Louisiana.") (emphases added and footnotes omitted).

See In the Matter of Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma, CC Docket 00-217, *Memorandum Opinion and Order*, 16 FCC Rcd. 6237, 6256-57, ¶ 41 (2001) ("We conclude, as the Kansas Commission did, that SWBT demonstrates that it satisfies the requirements of Track A based on the interconnection agreements it has implemented with competing carriers in Kansas. In support of its Track A showing, SWBT relies on interconnection agreements with Global Crossing, Sprint, Birch Telecom and Ionex Communications. Specifically, the record demonstrates that both Ionex Communications and Birch Telecom provide service to residential subscribers exclusively over their own facilities using the *UNE platform*. Sprint also provides local exchange service to business and residential subscribers.") (emphasis added and footnotes omitted).